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# What's missing from legal geography and materialist studies of law? Absence and the assembling of asylum appeal hearings in Europe

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There is an absence of absence in legal geography and materialist studies of the law. Drawing on a multi-sited ethnography of European asylum appeal hearings, this paper illustrates the importance of absences for a fully-fledged materiality of legal events. We show how absent materials impact hearings, that non-attending participants profoundly influence them, and that even when participants are physically present, they are often simultaneously absent in other, psychological registers. In so doing we demonstrate the importance and productivity of thinking not only about law's omnipresence but also the absences that shape the way law is experienced and practised. We show that attending to the distribution of absence and presence at legal hearings is a way to critically engage with legal performance.

## KEYWORDS

absence, asylum, ethnography, Europe, law, materiality

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# 1 | INTRODUCTION

There is growing awareness among geographers and legal scholars alike that “law is constructed by geographical space” (Faulkner et al., 2012, p.8). This is testament to decades of geographical scholarship foregrounding the co-constitution of space and law (Blomley & Bakan, 1992; for a review see Delaney, 2015). It has also coincided with broader awareness in legal studies of the importance of materiality to law which contends that law is limited by its lack of attention to the material structures that embody social relations and vice versa (Graham et al., 2017). The “new materialism” that has swept the social sciences has not only prompted legal scholars to more closely examine “objects, matter, ontology and the outside world” (Davies, 2017, p. 42), but also the very distinctions between the “inner” workings of law and its outward effects.

Consequently, materialism, which denotes the entanglement between matter and meaning (Davies, 2017), has been producing important developments in legal studies. Histories of law are being re-written (Johnson, 2015). Theories of law are being reread in a material manner (Philippopoulos-Mihalopoulos, 2018). And not only is the relation between “law” and “space” being rethought, via concepts like the *nomosphere* (Delaney, 2010) and *lawscape* (Philippopoulos-Mihalopoulos, 2018), but legal sites and events like courts, tribunals, hearings, and trials are being re-examined through a material lens (Jeffrey, 2019).

There is nevertheless awareness of materiality’s limitations for studying law. Some feel it has not gone far enough, remaining confined to human materialities and insufficiently attending to ecosystems, non-human life, place-agency, and environments (Bartel, 2018; Graham et al., 2017). Others assert that the law should not be completely reduced to materials (Bennett & Layard, 2015; also Pottage, 2012). Legal studies “cannot entirely abandon a notion of law as an abstract discourse based normative system that acts symbolically in the world,” Bennett and Layard write (2015, p. 417), suggesting that we must be aware of the representational core of law that connects “words and commands to the material world beyond” (2015, p. 417-8). Another concern is that a certain, literal type of materialism can obscure “the politics of ... what is missing and why” (Fowles, 2010, p. 25; also Meier et al., 2013).<sup>1</sup> There is a risk of over-privileging the conspicuous, tangible, and perceptible, to the detriment of “the many ways in which objects and things can be fleeting, ambiguous, partial, absent-present, ghostly and more-than-single” (Walters, 2014, p. 103).

There is indeed an absence of absence in legal materialist studies and legal geography. Our purpose, however, is not to take issue with the material turn per se or legal materialism, which has productively challenged doctrinal law’s blindspots (Davies, 2017). Rather, we explore how attending to absence can enrich a materialist approach to the law. Seminal work on materiality in science and technology studies (STS) suggests that a fully worked-out study of the material implies the study of the immaterial (Law, 2002). According to this view the proper focus of materialist analysis is not always material per se, but the distribution of absence and presence that gives rise to particular material configurations. Attending to this distribution is crucial to understanding how material structures are generated: absence constitutes presence and material is unintelligible without its opposite. Paying attention to absences as well as presences promises to provide a more complete legal materialism.

Materialist legal studies, including those involving court ethnography and legal geography, have not explored this potential however, nor addressed the practical challenge of translating this insight into research aides for empirical work. Our intention is therefore both to explore the feasibility of attending to absence in studying legal processes, and to offer new ways for legal studies to account for absence.

We draw on a multi-sited ethnography of in-person asylum appeal hearings in Europe between 2013 and 2019. These hearings face various “challenges of assembly”: the challenge of gathering the required components – documentary, evidentiary, and in relation to physical venue; the challenge of collecting the necessary people; and the challenge of ensuring the effective engagement of the participants, for example in terms of their alertness and attention. We show how absent attendees impact hearings and even when participants are bodily present they are often also concomitantly absent in various psychological registers. We begin by establishing the potential of attending to absence with reference to STS, socio-legal studies, and legal geography. We then set out the concept of absent-presence from cultural geographical writing, with a view to mobilising it for the first time to understand legal systems. We then describe Europe’s asylum appeals and how we read our ethnography for absence, including various challenges of doing so. We find that absence is an important, and neglected, element of legal materiality and geographical studies of law, and conclude by distilling the implications of this insight for legal studies and legal geography.

## 2 | WHY ATTEND TO LEGAL ABSENCES?

We see three reasons to pay attention to absences in legal studies. The first is rooted in conceptual work in STS: absence is intrinsic to presence. Without absence, presence loses its novelty and distinctiveness. In his book *Aircraft Stories*, John Law draws on actor-network theory to set out the paradox that “presence and coherence rest on that which cannot be made present and coherent” (2002, p. 10). He studies algebraic representations of the factors accounted for by the Royal Air Force when designing military aircraft during the Cold War which, he argues, are characterised by various logics of absence. There is the need for simplicity, for example: the logic that in order to avoid the paralysis of over-complexity things must be excluded, or “black-boxed,” from decision-making. Then there is the logic of corporeal absence: the substitution of the fear, vomit, and sweat of test pilots for a single mathematical term, “G,” representing a formal concept – “gust response.”

The equations give an illusion or impression of completeness. But for John Law they should be read differently: as expressions of a particular form of distribution between presence and absence. *Within* the maths, there is both presence and absence. Algebra, he writes, “is the expression of ... a set of tensions between what is present and what is absent but also present” (2002, p. 112). Like equations, law and legal processes are formal abstractions, claiming to capture the most salient aspects of social situations. There is a beguiling elegance to them. “[Law] can go everywhere and make everything coherent provided that it drops almost everything,” Latour writes (2010, p. 264). And yet, just like in algebra, it is both possible and necessary to read courts and legal processes critically: not only for what has materialised, but also for what they “drop.”

A second reason to pay attention to absences in legal studies is to get beyond surface appearances in studying hearings. Socio-legal scholarship alerts us to the risks of taking court processes at face value, because legal theatrics, including the rituals, architecture, symbolism, and vocabulary of hearings, can obscure, and indeed can be enrolled to obscure, the absurdness, power asymmetries, and coercion underpinning legal processes (Carlen et al., 1976). Although they project ideals of comprehensiveness and equality, such theatrics regularly reproduce social hierarchies and reinforce alienation.<sup>2</sup> The emphasis on bodily assembly via the legal tradition of habeas corpus, for example, suggests thoroughness but often does little to address the functional voicelessness arising from a lack of confidence and disorientation that denies litigants the ability to “assert, or express legal entitlements” (Bezdek, 1991), exacerbated by their classed, racialised, and gendered positions.

Indeed, a series of measures are taken in courts and tribunals to ensure the appearance of fairness, quite apart from its existence or non-existence. The perception of fairness is known to be at least, if not more, important than the outcome of legal processes for securing obedience to the law, and hence the rule of law (Tyler, 2006). The performance of law is a key mechanism of social reproduction, including social inequality. It is imperative then to see beyond the projected and performed when assessing legal phenomena, if legal geographers and ethnographers are not to be reduced to a sort of pliant, descriptive spectatorism. This involves not reducing presence to visibility, or absence to invisibility. Legal hearings are imbued with visual symbolism. “[T]he courtroom is ... a theatre,” Braverman writes, in which “[v]ision is central” (2011, p. 174). Just as we would expect a theatre critic to comment not only on what they see, but also, when appropriate, on what is missing from a performance,<sup>3</sup> so must legal geographers and ethnographers attend to absences as part of criticality itself.

A third reason to study legal absences concerns law’s “omnipresence.” This view of legal spatiality is common among socio-legal scholars and legal geographers.<sup>4</sup> It arises as the consequence of their justified eagerness to counter the aspatialism of legal doctrinalism, and is a reminder not only of the relationships between social and legal worlds, but their inseparability from the start (Delaney, 2010). Sarat’s (1990) seminal paper, for example, showed that law was experienced as inescapably “all over” by America’s poor. This is not, though, the only sense in which the law is omnipresent. A favourite fiction of liberalism is the everywhere-ness of legal rights and protections reaching its fullest expression in the vision of universal human rights. “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law,” declares Article 8 of the Universal Declaration of Human Rights for example, in gendered, rather heroic terms.

There is a risk that normalising the idea of law’s omnipresence undermines legal geographers’ ability to critique these sorts of claims to completeness. The law may indeed be everywhere in various senses, but legal rights are often experienced as impotent, useless, distant, irrelevant, and inaccessible by marginalised groups. From abusive home environments to extraordinary rendition, and from international stateless zones to destitute and homeless asylum seekers in European cities, the truism that law – including those laws that guarantee freedom from torture, freedom of expression, and freedom



from destitution – is everywhere struggles to capture these realities. While retaining the important prosaic omnipresence of law (Sarat, 1990), a focus on the simultaneous absences of legal protection offers another perspective on law's spatiality.

Studying legal absence requires us to recognise that presence and absence are not necessarily antonyms, but compose a “continuous and ambiguous spectrum” (Bille et al., 2010, p. 10) characterised by their “relationality” (Rappert & Bauchspies, 2014, p. 2) as well as their opposition. Addressing the paradox of the simultaneity of legal absence and presence, Davies describes the law's ability to be “everywhere and nowhere” (2017, p. 79) at the same time: “[i]t slips away, but is nonetheless right in front of you” (2017, p. 81). Law is capable of concomitant exclusion and inclusion (Agamben, 2005), displaying remarkably palpable shortcomings from its own asserted universalism. Attending to both the law's presence and absence is necessary to capture these complex legal spatialities.

### 3 | THINKING WITH ABSENCE ABOUT LEGAL EVENTS

The geographical concept of absent-presence helps to unpick the homologies between presence and attendance on the one hand, and absence and irrelevance on the other. Geographers take absent-presence to refer to the spectral traces of people and objects that are not physically present in the here and now, but that cast shadows over it from the past, the future or elsewhere (building on Derrida, 1994). Studies address the residues of people and things transmitted through the longings that missing people induce in those “left behind” (Parr & Fyfe, 2013, p. 617), and the haunting presence of the deceased (Maddrell, 2013). The approach appears in writing about class and politics (Edensor, 2005), landscape (Wylie, 2007), colonialism (Coddington, 2011), and in debates about globalisation, media, race, gender and sexuality (del Pilar Blanco & Peeren, 2013). Key to exploring absent-presence is “sensing the presence of people, places and things that have been obliterated, lost, missing or missed, or that have not yet materialized” (Bille et al., 2010, p. 3).

This points towards the utility of a plural approach to presence (Gill et al., 2019). Presence takes multiple forms, including memories, affects, threats, and fears. Emotions for instance have a complex materiality that is non-contiguous with either body or mind (Brennan, 2004; Massumi, 2002). Presence can also be detected via “different material registers beyond the visual and physically co-present ... it can be atmospheric, it can be sound, it can be light, temperature” (Buchli, 2010, p. 187).

Not only does absent-presence foreground how “objects, people and phenomena [are] ‘there’ from an experiential perspective, even though they are bodily ‘not there’” (Bille et al., 2010, p. 11), it also evokes the converse situation: how are people “not there” from a psychological or communicative perspective, even though they are bodily present. People and things can fail to have an interpersonal impact, for instance, despite their corporeal presence. Geographers have detected this phenomenon in prison visiting (Moran & Disney, 2019), Muslims' (in)visibility in Wales (Jones, 2012), and migrants' political agency in Sweden (Sigvardsdotter, 2013), showing how functional absence is possible despite physical, visible presence via mechanisms of silencing, side-lining, overlooking, and underestimating.

### 4 | ASYLUM APPEALS IN EUROPE AND THE ETHNOGRAPHY OF ABSENCE

To be recognised as a refugee under international law, a person must prove they fulfil the definition set out in Article 1(A) 2 of the 1951 Geneva Convention, as modified by the 1967 Protocol, namely that they are someone who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [*sic*] nationality and is unable or, owing to such fear, is unwilling to avail himself [*sic*] of the protection of that country.<sup>5</sup>

Recognising a refugee fulfils this definition is only one form of international protection states offer. They also offer humanitarian, subsidiary, and temporary protection statuses which have different requirements, sometimes specific to the destination country, and they may also have different interpretations of this definition.

To decide if a claimant warrants international protection, European states assess their narrative in light of principles set out in national and international law, often combining sources of evidence, including country of origin information such as that produced by the United Nations High Commission for Refugees, previous legislation and precedents, expert evidence, and first-hand accounts from claimants. Common assessment criteria when considering first-hand accounts include the degree of internal coherence they display (are they consistent across multiple renderings?), the level of detail they are able to provide (are they able to name particular places involved in their story, for example?), and the degree to which they are consistent with external sources of information (do their accounts tally with known facts about the region?). These

assessments are carried out via asylum interviews with government officials and, if the initial claim is unsuccessful, via appeals to an independent court or tribunal.

In Europe, appeals on refugee status determination are often dealt with via administrative law structures. The aims, objectives, and means of adjudication in administrative law are generally different from those in criminal or civil law. Traditionally, for example, administrative tribunals have been conceived as speedy and cheap forms of redress and resolution in high-volume dispute areas such as asylum and immigration (Thomas, 2011). Nonetheless, such perceived benefits often come at the cost of fairness, when procedural rights guarantees are undermined by efforts to achieve quick and efficient processing of claims (Hambly & Gill, 2020). Here, we refer to “courts” because there is no consistent nomenclature for the venues that hear asylum appeals in Europe (sometimes they are called “tribunals,” sometimes “boards,” sometimes “courts”). However, it is important to bear in mind the administrative nature of many of these jurisdictions, and that asylum “courts” can consequently operate very differently to higher courts or courts in other areas of law.

The EU-28 received over 1.2 million claims for asylum in both of the years 2015 and 2016, largely owing to unrest in Syria and other parts of the Middle East, although applications have declined since.<sup>6</sup> Initial claims are commonly rejected: nearly 40% were dismissed in 2016, rising to over 60% in 2019. The number of appeals against negative initial decisions peaked in 2018, at over 300,000. Over a third of appealed initial decisions were overturned between 2017 and 2019 and over 100,000 people received or improved their protection status in Europe via appeal in 2018 alone.<sup>7</sup>

Our access was mostly confined to the public galleries, corridors, and waiting areas of courts. We generally had to go through entrance security checks, although thoroughness varied.<sup>8</sup> The ushers’ and judges’ areas were usually not accessible to us, nor paperwork pertaining to cases.<sup>9</sup> Our access to case outcomes was also restricted.<sup>10</sup> We made observations from public seating in hearing rooms and remained as inconspicuous as possible, although when appropriate provided an explanation of the research.<sup>11</sup>

Legal ethnography challenges legal blindspots and habits of thought. Our approach is informed by the notion that ethnography is capable not only of describing the tangible and present but can render perceptible that which has been “removed, deleted and abandoned” (Armstrong, 2010, p. 243; see also Lucas, 2010; Sultana, 1992). This is achieved by performing “an archaeology of the emptied present and of the vacant spaces of culture” (Armstrong, 2010, p. 243) that focusses on gaps, traces, and memories. The result is an ethnography of absence itself that looks as much for what is missing in events and texts as for what is present.

As Frickel notes, however, “it is no simple task to study what is not there” (2014, p. 87) and “efforts to pin down absences empirically remain in comparatively short supply” (2014, p. 87). Indeed, we discovered considerable challenges of studying absence. Ethnography has a visual tradition and anthropologists have promoted emic analysis that prioritises observed over unobserved phenomena. Furthermore, the category of absence is so vast – almost everything is absent from particular situations – that studying it can feel overwhelming.

Nevertheless, some absences shouted out to us, both during observations and analysis. The non-attendance of appellants’ lawyers, for example, was noteworthy because it contrasted with what we observed in the majority of appeals and fell short of a reasonable expectation of what a potentially life-changing hearing should entail. And the psychological absences some participants exhibited whilst attending were striking because they jarred with social norms of engagement, respect, and communication. These absences, then, are not without context, but become significant because of their correspondence, or not, with what happens in comparatively well-resourced criminal trials, everyday life, other asylum hearings, and other professional environments. They can be understood as relative, not absolute, absences. Relative absences refer to things that are not there but “were there once, or have become hidden, or are somewhere else” (Frickel, 2014, p. 87).<sup>12</sup> Their existence is suggested by the shape of the hole in their wake, the residual traces they leave behind, or their distinction with comparable or analogous situations.

A large number of hearing observations was indispensable in identifying absences. Frickel notes that “comparative work on absences, both within cases and across cases, is particularly important” (2014, p. 91) because it is through comparison that an appreciation of what is missing in particular instances can develop. We observed over 850 asylum appeal hearings in Austria, Belgium, France, Germany, and the UK between 2013 and 2019, allowing us to detect absences via comparison and analogy that emphasised difference, dissimilarity, and contrast with other events.

We observed *in-person* appeal hearings, where appellants are expected to attend and give oral testimony. Some countries, like Greece, use *in-person* hearings infrequently, usually deciding cases via paper applications, in appellants’ absence. Some countries, like France, have a paper option for certain types of supposedly straightforward cases (Hambly & Gill, 2020). The procedural rules around when to use *in-person* hearings therefore conditions the presence of appellants at the legal reconsideration of their cases, and also shaped our sample. Furthermore, some countries, like Denmark and Italy, do not ordinarily allow the public, including researchers, into hearings. Our country sample therefore represents a balance

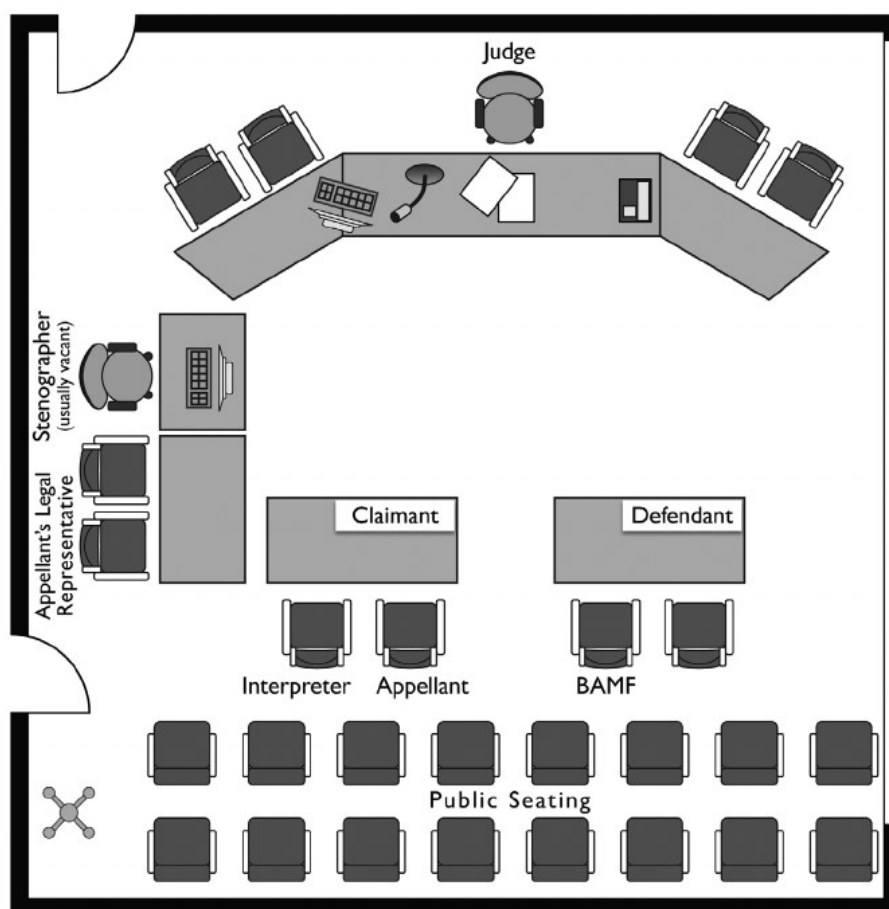
between the existence of, and access to, in-person hearings, a sufficient number to facilitate meaningful fieldwork, and diversity between common and civil law traditions.

Our case countries vary in some ways in terms of how they conduct in-person asylum appeals, such as in the typical spatial layout of hearings and the technologies utilised. In Belgium and France there is a single court, for example – the RvV/CCE in Brussels<sup>13</sup> and CNDA in Paris – while the UK and Germany have numerous regional courts. Nevertheless, the key features of in-person asylum appeals are broadly persistent allowing us to detect missing elements when they occurred. Hearings in each country are heard by at least one immigration judge, and generally involve an appellant, their legal representative if they have one, the legal representative acting on behalf of the national government if one attends, and an interpreter if required and available.<sup>14</sup> Figure 1 depicts the typical hearing layout in Berlin.<sup>15</sup>

We also found it useful to integrate different knowledge sources, because something undetected in one register can show up in another (on absence and triangulation, see Lucas, 2010). The following discussion draws on 41 interviews with former asylum appellants in the UK, and 10 Greek legal professionals. Interviewees were recruited via existing contacts with charities and refugee community groups through a research process that was separate from the hearing observations. Consent to anonymously quote interviewees in published work was collected.

## 5 | HAUNTED HEARINGS

Many of the hearings we observed turned on documentary evidence, and we became aware of a diverse and contested spatial political economy of the assembling of evidence to support asylum claims. Many times, apparently crucial pieces of documentary evidence – letters, photographs, certified copies of documents, and medical or educational certificates – were reported as missing or partial: lost, spoiled, mislaid, untranslated, incomplete, or misunderstood. So pronounced was this issue in the UK that considerable time was spent deciphering what was missing or included in judges' and lawyers' documents. Of 240 normal<sup>16</sup> hearings, we calculate that 9% of time was devoted to such discussions. Many cases that



**FIGURE 1** Typical hearing room layout in Berlin, Germany. BAMF stands for Bundesamt für Migration und Flüchtlinge (the relevant government department). Credit: Nicole Hoellerer and Yamen Albadin

experienced these issues were also adjourned, illustrating the agency of documentary evidence in absentia: of 48 adjournments we saw, 22 were because documentary evidence was missing. Other jurisdictions had electronic document management systems (and the UK has adopted one since our fieldwork), but even then the difficulties of collecting, scanning, and effectively sharing documents in time for hearings were not always resolved.

Assembling documentary evidence can require time, money, and effort, and people seeking asylum are unequally positioned to undertake this labour or influence others to do so. Latour's (2010) ethnography of the French council of state drew attention to the materiality of lawyers' files and their routes through the famous, elite French court. Our ethnography of the higher-volume asylum appeal hearing systems of Europe points towards the importance of also attending to the plural mechanisms through which documentary evidence fails to materialise in practice.

At least as striking as the non-materialisation of documents, however, was the absence of people from hearings. We saw many unrepresented appellants, for example, partly owing to "legal deserts" outside the largest urban centres, meaning a lack of qualified legal representatives in a particular area (Burridge & Gill, 2017). In Augsburg, Bavaria, for example, under 40% of appellants had a representative, compared to over 90% in Berlin and Paris. Being unrepresented usually reduces the chances of success in asylum proceedings<sup>17</sup> (Schoenholtz & Jacobs, 2002) but particular challenges face those who were previously represented and whose representatives have abandoned their case. Sometimes this is due to a lack of funds to pay for legal representation. We heard of one Austrian case in which a lawyer rose from his seat next to the appellant exactly two hours into the hearing, announcing he had not been paid for any more work, and left the appellant to fight the rest of his case alone<sup>18</sup> (Fieldnotes, 2019, Vienna).

Other times, being unrepresented may be the result of more than lacking funds. UK government legal aid for asylum is free, but only available to cases deemed to have over a 50% chance of success (for discussion of the UK's immigration legal aid market and the impact of austerity, see Wilding, 2019). Solicitors must decide whether they can win cases, and if they lose too many they may be barred from providing future government-funded legal aid. This means they are incentivised to abandon cases they fear they will lose. Being unrepresented can therefore seriously damage an appellant's case for two reasons. First, the fact that a legal professional has judged their case to be unwinnable sends a signal to the judge that the case is rejectable: they may suspect that there is something wrong with the case or the appellant's credibility, even if the reasons the solicitor dropped the case are unclear to them. Second, the absence of a legal representative can undermine appellants' confidence because it constitutes a vote of no confidence in their case:

my solicitor left my case ... it was difficult ... because I was still seeing ... the solicitor as [the] expert ... he was giving a lot of hope to me ... [but then] they said ... I didn't have over a fifty per cent chance and they left my case. [After that I was] nervous all the time ... going to court was not easy. (Interviewee, male, Afghan, 2015)

Through the signal that they send and the nervousness they induce in the appellant, absent legal representatives exert a presence despite, and through, their absence. It is as though their opinion that the case is weak is self-fulfilling, played out through the whispered replies and uneasy demeanour of the appellant.

When the government's legal representative does not attend, other challenges face appellants. In France, the vast majority of cases proceed without a government legal representative (we saw over 150 case hearings, or *affaires*, but never a government legal representative), and the German government at the time of our observations judged it to be impractical to provide a legal representative at every case. Instead BAMF<sup>19</sup> (the department responsible) had a 20% attendance target in 2018.<sup>20</sup> During one hearing a lawyer remarked that "It's really very seldom that someone from BAMF comes, isn't it?" "As good as never," the judge replied, and continued that it's a shame because then there is little "hearing character," meaning scant dialogue between parties, which can support judges' deliberations (Fieldnotes, 2018, Berlin).

Judges were concerned that BAMF's absence shifts the burden of interrogating the appellant onto them. From the appellants' perspective, the absence of the BAMF representative means the judge cross-examines them, which may be more intimidating and more likely to undermine their perception of an independent process. The lack of a BAMF representative also forecloses the opportunity to settle before or during hearings. In Germany the minimum protection for appellants is a deportation ban (DB). If the appellant's legal representative feels their case is too weak to secure refugee status or humanitarian protection, but the BAMF representative fears their case is too weak for the judge to totally dismiss the claim, it might make sense for all involved to settle on DB. This can spare appellants a stressful hearing and both parties the resources required to conduct it. In the absence of a BAMF representative, however, this opportunity disappears. We heard at least one appellant's lawyer say they would have settled if a BAMF representative had been present (Fieldnotes, 2018, Berlin).

The fact that BAMF representatives *sometimes* materialise creates its own effects. In one instance our researcher was waiting in Germany for an appeal based on religious conversion to begin. The case was based on the appellant's conversion to Christianity, which they would face persecution for practising if deported.

A witness arrives and greets the appellant in the waiting room. The witness, a Protestant nun, talks loudly and advises the appellant of what to say in their hearing. At one point in their conversation the question of the appellant's church attendance comes up. The nun says: 'I haven't seen you for quite a while now.' The appellant smiles in an embarrassed way and shrugs: 'I like to sleep on Sunday ... you know, with work and such and such.' Neither of them were aware that another woman sitting in the waiting area is from BAMF. During the hearing the BAMF representative (the same woman who was in the waiting area) asks whether the appellant attends church every Sunday. The appellant says that they do attend service every week at which point the BAMF representative continues: 'I have to pitch in here, because in the waiting area before the hearing, you told [witness] something different. Do you remember?' ... 'Can it be that you told [witness] that you didn't attend church for a while because you like to sleep in on Sundays?' The judge raises his eyebrows in surprise when hearing the BAMF representative's question, and the BAMF representative grins, looking victorious. (Fieldnotes, 2018, Berlin)

The appellant and the nun assumed that the BAMF representative was not going to be present, based on past absences. In this instance, the expected absence of the BAMF representative had a serious impact on the hearing, ultimately undermining the appellant's claim to be a practising Christian.

Appellants, too, sometimes did not arrive. Our interviews indicated that such absences often result from practical difficulties of navigating to court, difficulties finding childcare, not being informed (or misunderstanding) that they were supposed to attend, illness, anxiety, or misgivings about the hearing. Appellants' attendance is generally not mandatory<sup>21</sup> but when they do not attend they miss the opportunity to provide clarification on points of confusion or contestation. Lawyers in Greece, where appeals are on paper and where the proportion rejected exceeded 90% in 2018, were adamant that the lack of an oral in-person hearing disadvantages appellants (see also Hynes et al., 2020).

I believe it would be so important for the judges to see the applicants. Because when you actually see the person, you can have an idea of how traumatised the person is. (Interview, lawyer in Greece, 2019).

Lawyers in the UK, France, and Germany would therefore commonly ask to adjourn when the appellant did not arrive. "This is someone serious" one lawyer pleaded in Paris, showing how important it is to uphold the impression that the appellant still respects the court despite not attending. "This is a court!," the President replied, refusing to adjourn, "We can't send people reminders every 3 weeks!" (Fieldnotes, 2018, Paris).

Non-attendance also exposes the appellant to negative moral judgement because they have not arrived. Government legal representatives sometimes seized the opportunity to question their character in these circumstances. One appellant in the UK requested an adjournment by letter explaining they were suffering anxiety and stomach problems. The judge, clearly sceptical about the request, read "it says he is not eating and sleeping, suicidal thoughts and stomach problems and acid reflex. But it doesn't say he can't attend court ...." Capitalising on the judge's scepticism, the government representative weighed-in: "You can't just not turn up! The fact he is ill does not mean he cannot attend court!" (Fieldnotes, 2014, UK).

Lawyers representing absent clients can face difficulties, because they often have not had contact with them recently, and so have been unable to clarify their case. They also cannot draw on the appellant's testimony during hearings. One lawyer in France attempted to compensate for his client's absence with the meticulousness of his own performance:

He goes over the chronology again. It seems as though he is trying really hard to convince the panel, despite receiving sceptical looks from them! One judge is smiling as she bites her nails. She raises her eyebrows. Another judge looks annoyed. The president smiles and sits back in his chair. It feels as though they appreciate his efforts and sympathise with him (the lawyer) – but they are not writing anything. (Fieldnotes, 2018, Paris)

Conversely, some lawyers were resigned to the bad impression that their client's absence gave, and saw no point contesting the case. These appeals were often extremely brief. "I couldn't reach my client so I have nothing to add," one

French lawyer stated, who was finished within 30 seconds. “The problem is, we have no proof or documents. So I have nothing to add,” another lawyer explained. He too was finished within seconds, and the appeal took four minutes in total (Fieldnotes, 2018, Paris).

The challenge of assembling participants has driven courtroom technological innovations, which themselves influence participants’ absence and presence. We observed several appellants attending their asylum appeal hearings via video-link in France for example, a technique that has also recently been piloted in the UK. One case involved an appellant in French Guiana:

There is a man’s voice heard announcing the next case, presumably he is somewhere in the French Guiana court – we don’t see who the voice belongs to. When the appellant comes into view on the screen it takes a few seconds to refocus on them. I am not sure what the appellant can see on his screen in French Guiana. Can he see the panel? The room? Or just the person questioning him? One of the judges starts the questioning. Meanwhile, [presiding judge] looks really bored and fed up. He reads his diary, shunts his chair back and forwards, leans back, yawns, makes faces, pinches his nose, picks his teeth, bites his nails. There is a bit of an echo on the microphones; the line is not clear. (Fieldnotes, 2018, Paris)

The reorganisation that video-linking entails results in a splitting of the court space, and changes the atmosphere, speech, and behaviour of parties (Hynes et al., 2020). It also exposes the ambiguity of the presence/absence of participants. There are disembodied voices issuing demands. The appellant is audible and visible via a screen, but blurred and muffled. The judge is formally presiding, but looks bored and disengaged. The panel and room may or may not be visible to the appellant.

When the appellant is present with the interpreter in the same court as the judge(s), then they and the other parties present hear the appellant’s speech before it is translated. One effect of videolinking, however, is that when appellants are operating through an interpreter the court often never hears the appellant’s own voice in their own language. During the videolinking we observed only the interpreter has a microphone. Consequently, linguistic cues, such as intonation, volume, pitch, and tone, are excised.

Absences of other participants are often related to resourcing. In Belgium and Austria, judges had assistants to take notes during hearings, but in the other countries there was no such assistance at the time of our observations (although there had been in some places previously). Rather, judges produced their own records for their deliberations after hearings, or should cases be appealed again. Judges in the UK would therefore frequently stop the conversation mid-flow to write thoughts down, producing stilted exchanges. Some seemed palpably less present due to record taking – only rarely looking up, preferring instead to “keep their heads bowed, write notes and keep quiet. They almost fade into the background” (Fieldnotes, 2013, UK).

German judges, by contrast, were equipped with Dictaphones that they addressed periodically during hearings, switching them on and off, and addressing them directly when they wanted something on record. Many recorded after each sentence, which:

interrupts the flow in the conversation, and may prevent the appellant from remembering, because the judge has to stop the appellant from talking, then the judge records, then the interpreter has to interpret what the judge recorded. (Fieldnotes, 2018, Berlin)

The judges described this as “tedious” and “arduous.” One judge, struggling with his Dictaphone and having to re-record aspects, bemoaned the absence of court writers:

‘oh, technology ... We used to have court writers here in the past ... I can’t even remember it.’ – the judge is sighing with a smile – he seems nostalgic. (Fieldnotes, 2018, Berlin)

In summary, hearings were haunted by the absence or absent-presence of documentation, lawyers for the appellant and state, appellants, videolinked participants, and court writers, with significant material and legal effects. Without representatives, either another actor has to perform their roles (often poorly) or advocacy is left undone. Without appellants, their empty chair is a constant material marker of their non-attendance. Without court writers, judges employ a range of technologies to record the proceedings, which affect their dynamics.

## 6 | PARTIAL PRESENCES AND LEGAL HEADSCAPES

While the bodily absence of participants is influential, this is not to suggest that participants' actual physical presence was sufficient to eliminate the risks of their functional absence. Our interest here is in mental absences related to what Davies refers to as legal "headscapes" (2017, p. 77) – the terrain of law that "transgresses bodily and psychological boundaries" (2017, p. 81) and is "psychologically and relationally enacted" (2017, p. 81).

Numerous judges seemed tired, for example. They are invariably under acute time pressure – in France, for instance, it is common for judges to hear 13 cases in a day. One presiding judge in the UK appeared to nod off<sup>22</sup> and another judge who was observing fell asleep. Some self-reported fatigue, especially near the end of hearing days. Often this coincided with making mistakes, such as with the recording on the Dictaphone in Germany: "Oh. I'm sorry. I've been here a few hours already," "Sorry, it's a long day" (both Fieldnotes, 2018, Berlin). In these instances judges referred to their dwindling concentration: "now the concentration is decreasing a little" (Fieldnotes, 2018, Munich); "I'm not quite up to my full abilities anymore" (Fieldnotes, 2018, Berlin); "Well, we've been at it now for five hours, so the concentration is not what it was at the start" (Fieldnotes, 2018, Berlin).

Fatigue was not the only challenge to full judicial engagement, however. Cases sometimes involve details of brutal murders, torture, and rapes, and vicarious traumatising of judges is a constant threat (Gill, 2016). This refers to the emotional contagion of one set of feelings by another individual and, when not properly supported by counselling, "[t]he picture that emerges is clear: Those who work with the suffering suffer themselves because of the work" (Figley, 2002, p. 5). This can trigger feelings of guilt, anger, stress, frustration, exhaustion, and helplessness when working with trauma survivors (Century et al., 2007). Symptoms include "detachment [as a] distraction away from the humanity of the patient" (Figley, 2002, p. 218).

The brusqueness and disinterest with which judges sometimes reacted to appellants could be partly attributable to this effect. Generally, we were surprised at the lack of judicial intervention: for example, when interpretation was mumbled or abbreviated or when legal representatives' questions were aggressive and rude. We frequently observed judges avoiding eye contact with appellants, sighing loudly indicating impatience, or looking away disinterestedly. Brusqueness was particularly noticeable as hearings concluded, when many judges call an abrupt halt and either leave or move to the next case with very little consideration of the appellant.

Once the judge closes the bundle at the end of a hearing, it is as if the appellant is not even present in the room, and he completely and utterly ignores the appellant. (Fieldnotes, 2019, Düsseldorf)

Judge ignores appellant, closes bundle and opens bundle for next case. The appellant seems confused and begins a discussion with the translator. But the judge interrupts: "Can you ask the next appellant if the legal representative is coming, or if we can continue without him?" (Fieldnotes, 2019, Düsseldorf)

Appellants who attend can also be absent in myriad ways. Communicative difficulties, for example, are well-known to inhibit litigants from giving full evidence (Berk-Seligson, 2017). Furthermore, typically they arrive prepared to tell their whole story, but often their participation is supposed to be limited to providing specific input, like clearing up points of confusion or adding new information not already in the written documents. This frequently results in a discursive truncation of the asylum seekers' narratives. One Belgian judge explained that appellants were only allowed to add information not already on file, to encourage efficiency and short hearings. "What is really the point of listening for an hour to things you have already read in the file?" he reasoned (Fieldnotes, 2018, Brussels). This approach, however, produces confusion, awkwardness, and rudeness during hearings. The same judge became angry when appellants tried to go over material he considered was already documented.

The appellant starts to recount something of his story and the judge interrupts him within about ten seconds by saying 'Nothing I don't already know! Written procedure!' (Fieldnotes, 2018, Brussels)

The appellant again starts to try and say something and the judge again almost immediately interrupts him gruffly. 'For you and everyone at the back listen up, I will listen to nothing I already know from the files. *Written procedure.*' (Fieldnotes, 2018, Brussels)



Another form of absence of appellants concerned an inability to concentrate. Mental alertness is important because if questioning reveals inconsistencies in appellants' cases, these are often taken to indicate a lack of credibility, a slippery and yet decisive factor in refugee law (Sweeney, 2009). Yet physical ill-health and discomfort sometimes undermined appellants' concentration levels. One appellant "came in doubled up in pain and spent the whole hearing bent over the desk, with his head on the table and only inaudibly whispering replies, if he replied at all to the translator" (Fieldnotes, 2013, London). Others were on medication, and some attended their hearings while living in destitution, which is known to negatively impact physical health. Because the order of hearings is only finalised on the day in some jurisdictions, appellants can wait for hours for their hearings. Unaware of this, some came without food and drink, and attended hungry or thirsty. Access to food and water are primary social rights which have a direct bearing on other rights, including participation in legal processes, yet those seeking asylum are routinely denied them (Carrera et al., 2019; Jusionyte, 2019).

Mental ill-health may also have prevented full participation. Asylum seekers experience high rates of depression, anxiety, post-traumatic stress disorder, and other mental health problems (Silove et al., 1997). Many appellants felt underprepared, psychologically inadequate to the occasion, and nervous. They also reported the surreal aura of hearings. One interviewee said they were "here, but mentally dead" (Interview, appellant, female, Anglophone African, 2015). "Was I there? ... I wasn't myself. I was sitting there and not taking it in. I didn't understand anything. I hated the whole thing. Mentally, I wasn't there" (Interview, appellant, female, Anglophone African, 2015).

Others experienced intense stress. Ahead of hearings, interviewees reported sleep loss: "when you go to the court, you prepare yourself, maybe you won't sleep, you panic, you stress, you maybe sleep, or will not sleep, so will be in a mood which is not good" (Interview, appellant, male, West/Central African, 2015). Sometimes this produced debilitating levels of panic during hearings. "They ask you a question and you get panic, a panic attack. When you panic you can't say what you would like to say" (Interview, appellant, female, Ugandan, 2015). Some felt that their ability to receive verbally transmitted information was consequently impaired. "I was stressed ... I wasn't even listening properly, my head was buzzing," one interviewee recalled (Interview, appellant, female, Congolese, 2015). Others reported chronic forgetfulness.

Before I go to that court I had so much things to say but when I was there it was all completely ... out of my brain, I didn't remember anything to say ... Because of the situation. It was really stressful and nervous and for me it was a really big issue. I forgot everything ... (Interview, male, Afghan, 2015)

All the courts we observed also lacked formalised childcare, so it was common for appellants to get distracted by their young children and babies, who demanded attention during hearings. We saw multiple appeals where caregivers were upset by crying babies. Slightly older children (three or four years) present a different challenge. If they accompany parents into their hearings they might understand disturbing details, or detect their parent's distress, whereas if they are left outside they may need to be looked after by a stranger. One interviewee described how a security guard did this during her hearing:

I was there with my daughter, but one of the security guards have to watch her all of the time ... I was really stress[ed] as well because I was thinking about her ... When she cries she want to come in the room, they kept telling her get out, it was ... yeah ... (Interview, appellant, female, Congolese, 2015)

In numerous ways then, we observed participants in the hearing being simultaneously physically present and mentally absent from the events, their minds elsewhere. This highlights the diversity of forms of absence at asylum appeal hearings, including not just bodily absences of various sorts, or absences of documentary evidence, but also psychological absences. What links them all, however, is that they demonstrably impact the hearings. The absences we detected were constitutive of the legal processes we saw, often to the detriment of engagement, deliberation and legal quality. Ultimately, this "thinning out" of law risks disadvantaging appellants who rely on thorough legal processes and the opportunity and ability to take part in them for their protection and safety.

## 7 | CONCLUSION

Our observations have been focussed on only one type of legal hearing, which limits the degree to which we feel qualified to generalise about legal processes. We observed no higher court proceedings, for example: our research sites are located at the base of the legal pyramid not its apex. While this provides an interesting comparison to prominent legal geographical scholarship (Hughes, 2015; Jeffrey & Jakala, 2014), a particular perspective is inevitably gleaned from this position. This is to say nothing of the operation of law outside formal legal settings, in everyday life (Sarat & Kearns, 2009). Furthermore,

while we have discussed absences from hearings themselves, the asylum appeal system is at the heart of multiple wider absences and exclusions. For every asylum claim in Europe, many forced migrants are bordered from safety, often by the same nation-states that carry out the sort of judicial theatrics we have studied to show that “justice” is being done.

Notwithstanding these limitations, following Law’s (2002) insight into the value of researching absence alongside presence in studying materiality, this paper offers a new direction for the exploration of materialist approaches to law. Absences imbricate attempts to assemble the material, people, and capacities for conducting hearings. Hearings and their participants are fragile and often only partially assembled, while a series of absences undermine the reliability of legal assemblies for the reconstruction of memories and examination of narratives.

Like John Law’s algebra, we found that the formalism inherent to the rituals, language and ceremony of hearings disguises important gaps, power imbalances, and instances of non-coherence in the courts. In line with socio-legal scholarship that is sceptical of the way the law portrays itself as benign and consultative (Carlen, 1976), we detected a disjuncture between that which was *presented* and that which was functionally and meaningfully *present*. The inarticulateness of appellants was often not due to some externally produced phenomenon the courts battled against, for example, but the logical consequence of the disorientating, conveyor-belt-like procedures they undergo and the unfamiliarity of the role they are forced to play in court.

Our analysis underscores the importance of resources when considering the practical challenges of assembling the necessary evidence and people to conduct in-person hearings. It requires significant effort and time to ensure that everything necessary for the full consideration of a case is collected. There is violence inherent to under-resourcing this legal area, because it results in constricting the narratives and cases of appellants, which threatens their access to justice. Resourcing is ultimately political, reflecting the value that European societies place on protecting refugees and meeting their international obligations. Foregrounding the distribution between absence and presence highlights the political choices that facilitate hearings or foreclose them. Attending to absence, in other words, offers indispensable criticality with respect to legal events.

Attending to legal absences has also allowed us to hold onto the paradox that law is both “everywhere and nowhere” (Davies, 2017, p. 79), omnipresent and fleeting. Asylum appeals are clearly legal and yet the legal protection they promise is often out of reach. Adopting a view that is sensitive to the simultaneous absences and presences of the law would allow the sub-discipline of legal geography to critically attend to the practicalities of in-access to justice in innovative ways, while distancing itself from the spatial fantasies of universalistic human rights laws.

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## DATA AVAILABILITY STATEMENT

Due to the ethical and legally sensitive nature of the research, ethnographic notes taken in court could not be made openly available. Appellant interviewees were not asked for their permission to share their interview transcripts in an online open archive because of concerns that they could misunderstand what was being asked for, or feel obliged to agree but subsequently feel less able to conduct free conversation in research interviews as a result, thereby negatively impacting on the quality of the data generated. Additional details relating to, and data resulting from, a survey taken during observations of British asylum appeals between 2013 and 2016 are available from the UK Data Archive (persistent identifier: [10.5255/UKDA-SN-852032](https://beta.ukdataservice.ac.uk/datacatalog/studies/study?id=852032)).

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## ENDNOTES

- <sup>1</sup> Meier et al. suggest the material turn exhibits “an anti-intellectual bias that posits matter and the concrete as the real, supposedly solid, base of society” (2013, p. 423).
- <sup>2</sup> “[J]udicial personnel systematically present their coercive devices as being nothing more than the traditional, conventional and commonsensical ways of organising and synchronising judicial proceedings” (Carlen, 1976, p. 49).
- <sup>3</sup> E.g., if there is an unaccountable dearth of female or black actors.
- <sup>4</sup> E.g., “As naturalized features of modern life, the signs and objects of law are omnipresent” (Silbey and Cavicchi, 2005, p. 556); “Distinctively legal forms of meaning are projected onto every segment of the physical world” (Braverman et al., 2014, p. 1); “there is nothing in the world of spaces, places, landscapes, and environments that is not affected by the workings of law” (Delaney, 2015, p. 99); “The claim I am making here is that law is entrenched in everything that takes place in geographical space (to wit, *everything*)” (Philippopoulos-Mihalopoulos, 2018, p. 4).
- <sup>5</sup> The 1967 Protocol Relating to the Status of Refugees removed the restrictions in the 1951 convention, which limited refugee status to those who fled Europe “as a result of events occurring before 1 January 1951.”
- <sup>6</sup> To 721,090 in 2019.
- <sup>7</sup> Sources in this paragraph: Eurostat datatables TPS00191, TPS00192, TPS00193 (<https://ec.europa.eu/eurostat/data/database>) Accessed 26 March 2020.
- <sup>8</sup> As guards became used to us, for example, they often relaxed rules, not searching our bags or allowing us to have tablets for notetaking.
- <sup>9</sup> Rare exceptions occurred when judges invited us “backstage.”
- <sup>10</sup> UK decisions are not published; in France during our Fieldwork they appeared on a physical noticeboard in the CNDA (not online); in Germany they were available for a fee.
- <sup>11</sup> Relevant authorities were notified in advance about our research, although judges were usually not expecting us.
- <sup>12</sup> Conversely, absolute absences “are not there or anywhere else and probably never were” (Frickel, 2014, p. 88).
- <sup>13</sup> RvV is Flemish (Raad voor Vreemdelingenbetwistingen), CCE French (Conseil du Contentieux des Etrangers). In formal documents both appear like this.
- <sup>14</sup> Possibly also witnesses, ushers, “the public” (attendance varies), security and estates personnel.
- <sup>15</sup> Layout varies across Germany.
- <sup>16</sup> We completed time surveys in 240 UK hearings, but made separate observations in the “fast track” procedure (Gill et al., 2018).
- <sup>17</sup> Although arguably having a bad or exploitative lawyer is as bad, or worse.
- <sup>18</sup> In another instance, a lawyer asked for upfront payment before they would enter the hearing (Fieldnotes, 2018, Berlin).
- <sup>19</sup> Bundesamt für Migration und Flüchtlinge.
- <sup>20</sup> We observed 11% attendance in 2018.
- <sup>21</sup> For example, in the UK, an appeal can proceed if the Tribunal is satisfied the appellant has been notified of the hearing or reasonable steps have been taken to notify them, and proceeding is in the interests of justice.
- <sup>22</sup> “The [immigration judge] repeatedly nods off during the ... cross-examination. He looks ahead, eyes start to close then head lowers before he jerks up to attention” (Fieldnotes, 2014, London).

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